

Honorable Thomas S. Zilly

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LVB-OGDEN MARKETING, LLC,

Plaintiff,

v.

SHARON G. BINGHAM,

Defendant,

BANK OF THE WEST,

Garnishee.

Case No. 2:18-cv-00786 TSZ

**DEFENDANT’S MOTION FOR  
RECONSIDERATION OF ORDER (DKT.  
NO. 40)**

**NOTED FOR HEARING:  
DECEMBER 5, 2018**

ORAL ARGUMENT REQUESTED

**I. INTRODUCTION AND RELIEF REQUESTED.**

Sharon G. Bingham, Defendant and Judgment Debtor in the underlying action, respectfully moves the court to reconsider its order (Dkt. no. 40) denying her motion for summary judgment (Dkt. No. 33) and granting the motion for summary judgment (Dkt. No. 32) of Plaintiff (“LVB”), because new evidence now made available for the first time by Bank of the West (“BOTW”) shows that it properly exercised its discretion as trustee of the ‘Fisher Trusts’ to maintain in trust the assets at issue.

DEFENDANT’S MOTION FOR  
RECONSIDERATION OF ORDER (ECF NO. 40) - 1

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## II. STATEMENT OF FACTS

The Court is familiar with the underlying facts, which are summarized in its Order, Dkt. No. 40 at 1–2. Additional facts particularly relevant to this motion follow.

When the parties’ cross-motions for summary judgment were briefed, Mrs. Bingham had not received the documents submitted by the Garnishee Defendant BOTW *ex parte* and *in camera*. Declaration of Emanuel Jacobowitz, filed herewith (“Jacobowitz Dec.”) ¶ 2. As she told the Court in opposition to LVB’s motion, she “ha[d] not been informed, why the Fisher Trustee made that decision [to withhold distribution of trust funds].” (Dkt. No. 36 at 3:13–14). Nor had BOTW asked her whether it should disclose the information. Jacobowitz Dec. ¶ 3. Quite the contrary. When BOTW opposed LVB’s motion to view the documents, she assumed that BOTW’s concerns were well-founded. Jacobowitz Dec. ¶ 4. Nevertheless, her counsel wanted to present any potentially relevant facts to the Court on summary judgment; so he asked trustee’s counsel Mr. Ebel to share with him and/or the Court the reasons for BOTW’s exercise of discretion to the extent possible. *Id.* ¶ 5. Mr. Ebel took the position, however, that BOTW’s inner workings were confidential and that there was no need to disclose further information without a court order about the *in camera* submission. *Id.* ¶ 6.

After the Court’s Order was entered, counsel again contacted Mr. Ebel, who eventually shared relevant records. *Id.* ¶ 7 & Exh. A. These show that after Mrs. Bingham’s mother and predecessor beneficiary, Frances Graham, died in May 2017, BOTW reviewed documents including:

- The wills which created the Fisher Trusts;
- The February 2, 2016 opinion letter prepared for Mrs. Graham by attorney Dale Foreman, which Mrs. Bingham previously shared with the Court (Dkt. No. 33-1);
- Email describing Mrs. Bingham’s financial circumstances and drop in income, stating

that if the trust res was distributed to her, she would not do anything with it because “the creditors would take it all,” and stating her “financial expertise” as “none.”;

- Bank statements and a tax return of Mrs. Bingham’s; and
- A newspaper article describing how the Bingham’s had been ruined by their unwarranted trust in financial fraudster Thomas R. Hazelrigg III.

*Id.* BOTW reviewed these records and considered whether to distribute the trust corpus. *Id.* at BOTW 000084. Its minutes describe Mrs. Bingham’s falling prey to “fraud,” her “battle with creditors,” her personal loss of “6 million,” and that “her expenses exceed her income by more than \$400,000.” *Id.* The legal-opinion letter, referenced above, is relied upon. *Id.* “For these reasons,” the Committee minutes conclude, “I believe that should the funds be distributed to her, she will be incapable of distributing the funds to her own best interest and the funds should stay in trust.” *Id.*

These records are consistent with what Mr. Dean heard when the Fisher Trust followed bank officer Michele Bucklin to BOTW in 2016. Declaration of Henry W. Dean, filed herewith (“Dean Dec.”) ¶¶ 18–19. When she had been with Baker Boyer Bank, a judgment creditor’s lawyer asked Mr. Dean whether the trust corpus would become available upon Mrs. Graham’s death. *Id.* ¶ 17. Ms. Bucklin advised Mr. Dean that Baker Boyer had concluded that, unless circumstances vastly changed, it would exercise its discretion as trustee under the will provisions at issue in this case, and not distribute to Mrs. Bingham upon Mrs. Graham’s death. *Id.* In 2016, still prior to Mrs. Graham’s death, Ms. Bucklin and/or Mr. Hobson told Mr. Dean that BOTW had reached the same preliminary determination.

Similarly, several years earlier, a prior trustee, US Trust, when asked to disburse funds for a settlement for Mrs. Graham, and incidentally for Mrs. Bingham, had refused on the grounds, among others, that “as far as we know the O.D. and Nellie Fisher Trusts are all Mrs. Graham has left precisely

1 because of the way her family has mismanaged its finances.” Dean Dec. ¶ 12. US Trust later  
 2 confirmed to Mr. Dean that in its informed opinion, Mrs. Bingham could not well manage her  
 3 financial affairs, so that unless circumstances substantially changed, US Trust did not intend to  
 4 distribute the trust corpus to Sharon Graham Bingham upon her mother’s death. *Id.*

5  
 6 In short, every responsible lawyer and trustee who considered the question independently  
 7 concluded that Mrs. Bingham could not well manage millions of dollars and that distribution to her  
 8 upon Mrs. Graham’s death would not be appropriate under the Fisher wills. Mr. Dean was not at all  
 9 surprised, after Mrs. Graham’s death, to hear that BOTW had acted consistently with that decision.  
 10 Dean Dec. ¶ 19. BOTW has now confirmed that this is what happened.

### 11 III. AUTHORITY

12 Motions for reconsideration are disfavored. LCR 7(h)(1). Among the few reasons one may be  
 13 granted, though, is “a showing of new facts...which could not have been brought to its attention earlier  
 14 with reasonable diligence.” *Id.*; and see, e.g., *Navajo Nation v. Confederated Tribes & Bands of the*  
 15 *Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003) (“Reconsideration is indicated in the face of  
 16 the existence of new evidence, an intervening change in the law, or as necessary to prevent manifest  
 17 injustice.”) With regard to Mrs. Bingham’s motion for summary judgment and her opposition to  
 18 Plaintiff LVB’s motion for summary judgment, that ground applies.<sup>1</sup>

19  
 20 Mrs. Bingham relies on provisions which the Court described in its Order (Dkt. No. 40 at 2):

21  
 22 The trustee of the Fisher Trusts, currently BOTW, is only authorized to

23  
 24 <sup>1</sup> Mrs. Bingham states no opinion on the merits of the motion for reconsideration just filed by Bank of  
 25 the West, Dkt. No. 42, to which she did not contribute, regarding its separate motion for summary  
 26 judgment and its separate opposition to LVB’s motion for summary judgment.

1 withhold disbursements if, based on the trustee's uncontrolled discretion,  
 2 the beneficiary is "incapable of managing to his or her own best interest  
 3 and advantage the property to be distributed. . . ."

4 The Court clearly stated its ground for denying Mrs. Bingham's motion and granting LVB's motion:

5 the Declaration of Stefanie Thibedeau.... attests that "[t]he Trustee has  
 6 complete authority over the management of the Trusts' corpus, including  
 7 uncontrolled discretion and an affirmative duty to distribute or withhold  
 8 funds to the Trusts' beneficiaries as it sees fit." .... That is not accurate.  
 9 The trust documents grant the trustee uncontrolled discretion only in the  
 10 context of making a determination that the beneficiary is incapable of  
 11 managing her assets to her own best interest and advantage. **There is no**  
 12 **evidence before the Court indicating that the Trustee has made such a**  
 13 **determination or the grounds for such a determination.** That BOTW  
 14 believes the Trustee has uncontrolled discretion to withhold distributions  
 15 for any reason does not raise a dispute of material fact sufficient to  
 16 withstand summary judgment. The Fisher Trust documents control.  
 17 Because the **only** evidence in the record demonstrates that Sharon  
 18 Bingham is over the age of 45, is the sole heir of the settlors, and is  
 19 therefore "entitled to have distributed . . . the entire then remaining share"  
 20 of the Fisher Trust assets, docket no. 5-1, BOTW was required to list all  
 21 the Fisher Trust assets as Sharon Bingham's property in its answer.

22 Dkt. No. 40 at 6:6 – 7:6 (underlining in original, bolding added).

23 A court shall grant summary judgment where "there is no genuine dispute as to any material fact  
 24 and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court "must view  
 25 the evidence in the light most favorable to the nonmoving party and draw all reasonable inference in the  
 26 nonmoving party's favor." *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 459 (9th Cir. 2018). Respectfully,  
 Mrs. Bingham disagrees with the Court's conclusion that Ms. Thibedeau's Declaration failed to even  
 raise an inference to prevent summary judgment. But it is clear that the missing piece of the puzzle,  
 which would have prevented summary judgment, was "evidence indicating that the Trustee has made  
 such a determination [and] the grounds for such a determination." Dkt. No. 40 at 6:15–17. That

1 evidence was solely in the hands of BOTW. Mrs. Bingham did not have that evidence. Jacobowitz Dec.  
2 ¶¶ 2–3; Dean Dec. ¶ 20. Putting speculation before the Court would have been inappropriate; Mrs.  
3 Bingham stuck to what she could show, presenting the Court with the legal opinion letter which had  
4 been shared with BOTW. Dkt. No. 33-1. She also tried, through counsel, to get the evidence from  
5 BOTW, but was rebuffed. Jacobowitz Dec. ¶¶ 5–6. The garnishment statute does not provide for  
6 discovery between a judgment debtor and the garnishee defendant,<sup>2</sup> and as a beneficiary, Mrs. Bingham  
7 could not demand a declaration from her trustee, so she had no further recourse. Now, though, the  
8 precise evidence, the absence of which the Court found dispositive, is before the Court.  
9

10 The only remaining question, then, is the one presented in Mrs. Bingham’s underlying motion  
11 and opposition brief: whether BOTW manifestly abused its discretion when it refused to distribute.  
12 LVB argued on summary judgment that a trustee cannot, as a matter of law—regardless of the terms of  
13 the trust—withhold distributions merely to keep trust funds out of the hands of creditors. LVB is wrong,  
14 for the reasons stated in Mrs. Bingham’s prior briefs (Dkt. Nos. 33, 36, 39). LVB cited no precedent on  
15 point, only for the position that when a trust has terminated, the trustee cannot refuse to distribute.  
16 Because BOTW was expressly given and did exercise discretion to maintain the trusts when it  
17 determined in good faith that the beneficiary could not manage the assets to her best advantage or  
18 interest, this trust has not terminated.  
19

20 Equally important, the new evidence shows that BOTW was not merely trying to keep the assets  
21 out of the hands of creditors (although that would have been reason enough); it had other good grounds  
22 for its determination. As discussed *supra*, BOTW relied on a legal opinion, and considered the facts that  
23

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24 <sup>2</sup> Mrs. Bingham could not even open up another satellite action to demand disbursement, and demand  
25 discovery thereunder, because she agreed with BOTW, so such an action would have been frivolous.  
26

1 Mrs. Bingham and her husband had lost more than a hundred million dollars in bad investments by  
2 trusting the wrong people, that she had personally lost \$6 million, and that “her expenses exceed her  
3 income by more than \$400,000.” That is practically the picture of a spendthrift who needs a trustee.  
4 And while law is not up to majority vote, it cannot be entirely without significance that so many  
5 excellent lawyers and trustees independently reached that conclusion.  
6

#### 7 IV. CONCLUSION

8 For the reasons set forth above and in Mrs. Bingham’s underlying summary judgment briefs,  
9 the Court should reconsider its Order, deny summary judgment to LVB, and grant summary judgment  
10 for Mrs. Bingham, dismissing Plaintiff’s controversion of the Garnishee Defendant’s answer to the writ.  
11

12 DATED this 5th day of December, 2018.

13 **JOHNSTON JACOBOWITZ & ARNOLD, PC**

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23  
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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the all other appearing parties.

DATED this 5th day of December, 2018.

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